Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-845

ALBERTA S. GILINSKY,

Petitioner,

against

COLUMBIA UNIVERSITY in the City of New York; WILLIAM J. McGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

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OCTOBER TERM, 1976

No.

ALBERTA S. GILINSKY,

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COLUMBIA UNIVERSITY in the City of New York; WILLIAM J. MCGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Petitioner respectfully prays that a writ of certiorari issue to review the decision and final order of the Court of Appeals of the State of New York decided on June 8, 1976, rehearing denied September 21, 1976. The Court of Appeals reversed the decision of the Appellate Division of the Supreme Court of the State of New York, First Department, that had unanimously confirmed the Human Rights Appeal Board's findings and decision that respondents had discriminated on the basis of sex against petitioner in appointment to the faculty of the Psychology Department of Columbia University. The Appeal Board (3-1) had reversed the Commissioner of the State Division of Human Rights.

Opinions Below.

The decision of the Court of Appeals of the State of New York was accompanied by an opinion, officially re-

ported at 39 N. Y. 2d 612 (1976), Appendix A. Motion for rehearing was denied without an opinion. The Appellate Division of the Supreme Court of the State of New York, First Department decision, 48 A. D. 2d 1012 (1975), affirmed the Human Rights Appeal Board without opinion. The opinion of the Human Rights Appeal Board, not officially reported, is printed in Appendix B hereto. The Commissioner of the State Division of Human Rights (Commissioner) made findings of fact and conclusions of law printed in Appendix C.

Jurisdiction.

The decision of the Court of Appeals of the State of New York was dated June 8, 1976; a timely motion for reargument was denied September 21, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

Questions Presented.

The following questions are presented by the appeal:

1. Whether the Court of Appeals denied petitioner the guarantee of due process of law under the Fourteenth Amendment to the United States Constitution when it reversed the findings and decision of the Human Rights Appeal Board affirmed by the Appellate Division of the Supreme Court, First Department, and upheld the arbitrary and unwarranted findings and order of the Commissioner clearly not supported by the substantial evidence on the whole record.

2. Whether the Court of Appeals denied petitioner and all academic women her and their fundamental right of liberty to teach under the due process and equal protection clauses of the Fourteenth Amendment when its decision and opinion unlawfully restricted judicial oversight of faculty appointment at the crucial point of entry to academic faculties in private institutions of higher learning.

3. Whether the Court of Appeals deprived the petitioner of equal protection of the law when it made a gender-based classification that teaching of doctoral students is a requisite qualification for university appointment.

4. Whether the Court of Appeals in support of its decision of no discrimination denied petitioner's academic freedom and First Amendment right of free speech to criticize Columbia's hiring policy.

Constitutional Provisions Involved.

Amendment I.

"Congress (state) shall make no law • • • abridging the freedom of speech • • •"

Amendment XIV.

Section 1.

"• • • nor shall any state deprive any person of life, liberty, or property, without the process of law, nor deny to any person within its jurisdiction the equal protection of that law."

Statutes Involved.

The federal statute involved is Title VII, the Civil Rights Act of 1964 §703(a)(1) as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2 (a)(1):

§2000e-2. Discrimination because of race, color, religion, sex or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The New York statute involved is the Executive Law of the State of New York (The Human Rights Law) (McKinney's 1972) §296.1.(a):

§296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Statement of the Case.

Dr. Gilinsky (petitioner) initiated her complaint by filing a Charge of Discrimination under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2, with the Equal Employment Opportunity Commission

(EEOC) on April 17, 1972 (3b, 141).* The EEOC deferred to the New York State Division of Human Rights April 20, 1972. Subsequently, she filed with the Division a complaint charging the respondents (Columbia) with an unlawful discriminatory practice relating to employment by refusing on grounds of sex to appoint her to the faculty as a visiting professor and/or tenured professor (20a).

The Regional Director of the Division after investigation determined that it had jurisdiction in the matter "* * * and that there was probable cause to believe that the respondents have engaged or are engaging in the unlawful discriminatory practice complained of," and recommended a public hearing, conciliation having failed (1b).

Dr. Gilinsky's particulars appear on the Division's form (20a). It spells out her application for appointment to the faculty as well as an appointment as a visiting professor for 1972-1973; that she believed that vacancies did exist; and that refusal of both applications was unlawful sex discrimination.

Columbia served a verified answer (21a-25a) that admitted some of the facts alleged; denied the charge and alleged three defenses.

Hearings were held before a trial examiner on May 22, 23, 24 and June 13, 1973, who made no report or recommendation. The Commissioner based upon his findings of fact held that Columbia did not discriminate

*References are to pages in respondents' appendix submitted below. References to petitioner's appendix submitted below are designated—b. Clerk of the Appellate Division, First Department, has been requested to certify and transmit entire record to this court.

against Dr. Gilinsky on account of her sex and ordered her complaint dismissed.

Dr. Gilinsky timely appealed to the State Human Rights Appeal Board and it (3-1) reversed and vacated the decision below.

Columbia petitioned the Appellate Division for an order reversing the Appeal Board decision on the grounds that it failed to limit its review to determine whether the findings and order of the Commissioner were supported by substantial evidence and that Columbia was denied due process of law by the Appeal Board exceeding its statutory authority.

The Appellate Division (800) unanimously ordered that the determination of the Appeal Board be confirmed and dismissed Columbia's petition. Columbia moved for reargument or, in the alternative, for leave to appeal to the Court of Appeals. Reargument was unanimously denied but leave to appeal was granted (799). The Court of Appeals unanimously reversed the Appellate Division (Appendix A) and petitioner was denied reargument.

The denial of petitioner's due process and equal protection of the law under the Fourteenth Amendment to the Federal Constitution stems from the decision and opinion of the New York Court of Appeals and the issue was raised upon reargument. Until then petitioner was for the most part successful below.

• • •

In April, 1968, at the suggestion of Professor Terrace of the Psychology Department of Columbia (61-62), Dr. Gilinsky wrote to Professors Hefferline and Graham of the personnel search committee concerning the prospect of a senior teaching appointment in experi-

mental psychology at Columbia University (61-64, 630, 631, 632). At the time she was an associate professor at the University of Bridgeport where she attained tenure as a full professor in 1970 (46, 47). Hefferline responded (64, 633) that there was "no business as usual" at Columbia (student riots) and Graham (65, 634) encouraged her to write to the new Chairman, Professor Bush, about "a possible opening at Columbia" and "presenting your name." She wrote Bush reviewing her previous request (68, 635), met with him, and sent a follow-up letter (69, 636). She received no response from Bush or any other in writing (70, 74) but had conversations with Graham and Professor Hochberg (75, 76). Dr. Gilinsky then wrote to Professor Nevin on January 23, 1971 (640), after reading his letter of January 5, 1971, to the New York Times (641) that stated Columbia's Department of Psychology had attracted five new tenured professors within two years. On February 28, 1972 Dr. Gilinsky wrote again from Cambridge, England to President McGill (649) for an interim appointment during her academic sabbatical year 1972-1973. Her letter was forwarded by McGill to Nevin (650) and thereafter she received a rejection both for interim appointment as a visiting professor and for appointment (651) culminating her efforts begun in 1968 at Terrace's suggestion.

Dr. Gilinsky's educational background and qualifications both in research and teaching were documented in her curriculum vitae (671-677) and were elicited in testimony (24-49) never questioned or controverted by Columbia.

She had collaborated as a member of the Scientific Staff at Columbia with Graham on his Navy and Air Force research grants and under her own grant from the United States Air Force (38-39). As Principal Investigator she performed research under two National Science

Foundation grants at Bridgeport University and as an invited visiting professor at the Physiological Laboratory at Cambridge University, England (41-42). She taught a wide range of subjects in Psychology at Tufts University, Vassar College and Bridgeport University (42-47). She was a consultant to the Institute for Educational Development and the Institute for Defense Analysis (48-49), and an industrial research psychologist at IBM's Thomas J. Watson Research Center, Yorktown Heights, New York (49). A member of Phi Beta Kappa and Sigma Xi, she has made significant research contributions for which she has achieved recognition as a member of the National Research Council of the National Academy of Sciences (672), and as a Fellow of the American Psychological Association (32, 671) and the American Association for the Advancement of Science (33, 671).

Although Dr. Gilinsky, a graduate Ph.D. of the Psychology Department at Columbia, highly qualified in teaching and research, was encouraged to apply to Columbia, the men in high position had no real intention of employing any woman to a senior post.

The unwritten rule at Columbia that no woman would be appointed in the Psychology Department (538-539) had been relaxed to permit a woman to enter the lowest rank, but not to a senior faculty position. None of the defendants testified at the hearings to deny this or any of the charges.

While Columbia granted Ph.D.'s to qualified women, as the statistics below reveal, it employed only one tenured woman in the entire Faculty of Pure Science, none in Psychology.

Table AS-6 Faculty of Pure Science, Full Time Faculty "Proportion of Women by Rank":*

Tenure	Total Men & Women No.	Women No.	%
Professor	71	1	1.4%
Assoc. Professor	15	0	0.0%
	86	1	1.2%
Non-Tenure			
Assoc. Professor	4	0	0.0%
Ass't Professor	46	4	8.7%
Total Tenure and Non-Tenure Associate Professor	19	0	0.0%

Table AS-7 Faculty of Pure Science, Full Time Faculty, *Psychology Department*—1960-69

	No.
Tenure Women	0
Tenure Men	11

Table T-4 PhDs Granted to Women—Psychology

	Men & Women U.S. Total	Columbia		
	1960-69	1960-69	1950-59	1940-49
% Women	20.2%	39.8%	21.4%	33.3%
Total	(9135)	(361)	(201)	(111)

*Statistics from Columbia's Affirmative Action Plan Exhibit R, Plan Exhibit III-D-2(3).

Reasons for Granting the Writ.

This case concerns for the first time the fundamental right, the liberty to teach, of a highly qualified woman to be considered free of sex bias for appointment to senior faculty of a distinguished private university. The American Council on Education stated in its motion for permission to appear *amici curiae* in the Appellate Division of the Supreme Court "* * * the outcome of this case (concerned with higher education) will be of extraordinary significance to the entire academic community of the United States * * *" The Court of Appeals' decision is state action to which the Due Process and Equal Protection Clauses of the Fourteenth Amendment has reference. *Shelley v. Kraemer,* 334 U. S. 1 (1948); *Galella v. Onassis,* 353 F. Supp. 196, 232, aff'd in part, rev'd in part on other grounds 487 F. 2d 986 (CA2 1973). The unjustifiable action is the type of exertion of state power that offends the American ideal of fairness violative of the due process and equal protection of the law the amendment was intended to insure. See: *Ex. Bd. of Eng., Arch. and Surv. v. Flores DeOtero,* U. S. , 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976). The Court's approval of the Commissioner's findings and decision was not rational and not supported by substantial evidence on the whole record and denied petitioner due process. The Court's exemption of institutions of higher learning from stated public policy, state and federal, violated petitioner's constitutional right to due process and equal protection of the law and will perpetuate and intensify sex discrimination in those institutions. No compelling state interest was cited to support this judicial exemption. A constitutional question substantial in character is presented.

The Court of Appeals denied petitioner due process of law by upholding the arbitrary and unwarranted findings and order of the Commissioner patently not supported by the substantial evidence on the whole record.

The Court of Appeals decision was not supported by substantial evidence on the whole record and was arbitrary and capricious in reversing the decision and findings of the Human Rights Appeal Board affirmed by the Appellate Division. In its opinion (opinion, pp. 615-616, 1a)* the Court refused to consider Columbia's continuing discrimination against petitioner during the period 1968-1972; failed to consider relevant, material and competent evidence produced by Columbia that manifest clearly that the stated reasons for her rejection were pretextual and used as a cover-up of sex discrimination; and found that, although neither alleged, proved or given as a reason for rejection, Columbia was excused because of operating deficits restricting new faculty appointment.

The Commissioner's findings affirmed by the Court of Appeals that the petitioner had first applied for a tenured position at Columbia in 1972 was contrary to the documentary evidence. The finding of "no need" for a tenured professor in the area of sensation and perception was not supported by the evidence. Both findings were unwarranted, arbitrary and irrational since Columbia, during the period her candidacy was under consideration beginning in 1968, appointed to tenure five men and promoted another two, all seven with similar or less qualifications in the area of sensation and perception. "No need" was pretextual because after rejecting her in 1972 when vacancies existed Columbia, and the Court of Appeals was so informed, proceeded to promote to tenure in 1973 still

*Refers to Court of Appeal's opinion set forth in Appendix A attached hereto.

another male centrally in the area of sensation and perception, Professor Donald Hood, now Chairman of the Department.

Petitioner's application received scant, if any, due process. The Department Executive Committee did not follow procedures prescribed by Columbia for appointments and abdicated its preliminary decision-making powers to Dean Fraenkel. Petitioner was entitled to be judged as a scholar and teacher by her peers on the Executive Committee, not prejudged on other grounds by the Dean.

The decision to reject this highly qualified woman was made by Dean Fraenkel, known for his bias against women on faculty who had publicly stated "• • • a tenured university position • • • requires a tremendous amount of dedication and time that interferes with our normal idea of a woman's role in the family" (638).

Even before the Department Executive Committee, consisting of the tenured faculty, met to consider Dr. Gilinsky's application, Hochberg was given Fraenkel's decision. The minutes of the meeting state:

> "Hochberg stated that the question rested with the Dean • • • Fraenkel asked the area and Hochberg told him Perception. Fraenkel advised Hochberg not to waste his time, and Hochberg informed him that an Executive Committee Meeting was scheduled to review the situation and he repeated that we could not have that position • • • he did not think any tenured appointments were available in that area *or any other* for at least the next four years" (689). (Emphasis added.)

The proof of sex discrimination lay in the words "or any other" since three tenured vacancies were budgeted (686, 795) and did exist but only for a man, Professor Hood.

The Dean's message to the Executive Committee was plain. He mandated a discriminatory act, and the Appeal Board so held (Appendix B, pp. 11a-12a, 16a). The Executive Committee obeyed the Dean's directive. The scholastic qualifications of Dr. Gilinsky were never questioned by its members, the department's needs and the existence of vacancies authorized by the Dean were not discussed and not in issue (685-686). What was at issue was the sex of the candidate and the need to find a justifiable excuse for rejecting her. The Executive Committee meeting was spent almost entirely in deliberation as to what area the petitioner was in, whether "vision," "perception," "physiology" or "required further thinking." The only action taken at the meeting was to send the "standard letter to inform Gilinsky." That letter was pure evasion, stating that there was "no vacancy in your area" and served to further the cover-up of sex discrimination.

The Court of Appeals cited the report of June 14, 1972, from the Department Chairman to the Dean concerning the 1973-74 budget and stated "(it) tersely denied any vacancy in that area" (opinion, p. 618, 4a). This post-rejection document is suspect, designed to sustain the pretext. In using it, the Court gave judicial sanction to the absence of due process and the cover-up.

The Court of Appeals further supported Columbia's pretext when it pointedly upheld the Commissioner's unwarranted and irrelevant finding that operating deficits and efforts to control spending underlay Columbia's rejection of petitioner (opinion, p. 618, 4a). Financial considerations were never at issue. The Executive Committee's minutes quoting Dean Fraenkel did not cite budgetary restrictions or discuss them as a reason for denying the department the appointment. The rejection letter (651) and other communications to petitioner never referred to budget. Columbia pleaded three affirmative defenses but

did not allege as a defense or submit substantial proof, documentary or otherwise, of true budgetary restraints. Patently, budget could not be a valid reason for refusal to appoint petitioner to a temporary visiting professorship since she had offered to teach and conduct research at Columbia during her sabbatical year without compensation by Columbia (656).

Budget restraint as the basis for rejecting the tenured appointment was incredible because 13 tenured positions were authorized to be filled and were provided for in the budget of the department (14b), three were vacant, (686, 795) and President McGill had previously announced publicly there would be no reduction in the faculty or enrollment ceilings. *New York Times,* 1971, Ja 11, 17:1.

The Human Rights Appeal Board based its findings of sex discrimination and failure to accord petitioner's application due process on the undisputed facts produced by Columbia (15a-17a). The Appeal Board's decision and opinion supported by substantial evidence properly stayed within the statutory bounds of review and rationally determined that the Commissioner should be reversed. The Court of Appeals' holding that "the Appeal Board exceeded its stautory authority by ignoring (Commissioner's) findings and substituting its own view of the evidence" was on this record an arbitrary and capricious denial of petitioner's due process.

The Court of Appeals denied petitioner and all academic women due process and equal protection of law in faculty appointment by unlawfully restricting judicial oversight in institutions of higher learning.

The Court of Appeals in its opinion held that "neither the commissioner nor the courts should invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty

appointment, promotion and tenure, especially in institutions of higher learning" (opinion, p. 618, 5a).

Here the Court told the academic community that invidious discrimination will be permitted in employment in the universities although proscribed by public policy found in the Executive Law of the State of New York (The Human Rights Law) and Title VII as amended. The Court told petitioner and academic women it will not enforce the law, even though New York never exempted education and Congress in 1972 amended Title VII specifically removing the exemption in education (see: The House Report No. 92-238 on the Equal Employment Opportunity Act of 1972, P. L. 92-261, 1972 U. S. Code Cong. and Adm. News, pp. 2154, 2155).

The Court of Appeals by judicially creating an enclave immune from judicial oversight improperly perpetuated the unequal treatment of women in higher education. Women have the same right to equal employment opportunity in universities as in major industrial organizations. Distinguished voices from within the university itself today find no difference between the university and prestigious industries, and as Columbia Professor Walter P. Metzger claims: "• • • The integrated academic organization and the modern business organization seem very much alike, if not of kin" (Metzger, W. P., *Academic Freedom in Delocalized Institutions. Dimensions of Academic Freedom, University of Illinois Press,* 1969, p. 17). Metzger contends that the nature of the American university has changed dramatically while the ideas consonant with it have not. He attributes this change to the "growing involvment of the federal government with the affairs and fortunes of academe • • • In 1964 the federal contribution to higher learning totaled $1.5 billion • • • It constituted, because of its distribution, a large percentage of the incomes of the major places—83 percent of Cal Tech's, 81 percent of

MIT's, 75 percent of Princeton's. For home reference, it may be noted that Columbia, third among recipients, got $51,000,000, an intake that amounted to almost half of that year's operating budget • • •" (p. 22).

The Court of Appeals in restricting judicial oversight of faculty appointment in institutions of higher learning subverted the constitutionally protected fundamental right of petitioner's liberty to teach. See: *Developments in the Law—Academic Freedom,* 81 Harv. L. Rev. 1045, 1080 (1968); *Board of Regents v. Roth,* 408 U. S. 564, 572 (1972).

The Court of Appeals did not comprehend that the legitimate state and federal interest to prohibit discrimination in hiring left petitioner entirely without protection. Guidelines exist for promotion, tenure and termination of faculty. Provisions for proper notice, hearings, reviews, etc. regarding non-renewals of appointments are required either by contract, the tenets of the American Association of University Professors or the bylaws within the university. By contrast, except for state and federal fair employment statutes and the Federal Constitution, no such protection exists for initial hiring. It is at the very threshold, appointment to faculty, that judicial oversight is crucial to guarantee due process and equal protection against unlawful sex discrimination.

The devastating effect of the decision of the Court of Appeals will discourage, if not prevent, women from developing their intellectual skills and making their full contribution to society.

The Court of Appeals' decision and opinion depriving petitioner of the protection of the court serves to condone and perpetuate the historical bias against women and minorities in academe. Its decision lends judicial substance to and fortifies the "old boy" network that controls

university hiring. It legally sanctifies the tradition of white male faculty exclusivity in the senior ranks of institutions of higher learning, a concept that is inimical to modern democratic open society.

The Court of Appeals by restricting judicial oversight harms women and minorities, and by denying petitioner due process and equal protection denigrates state and federal policy aimed at securing equal employment opportunity.

The Court of Appeals insinuated an apparently sex-neutral policy with discriminatory impact against petitioner and academic women.

The Court of Appeals in its opinion insinuated an apparently sex-neutral policy with discriminatory impact against the petitioner and academic women when it posited the requirement of prior teaching experience in doctoral programs (opinion, p. 617, 4a). In particular it held that petitioner must have taught doctoral students to qualify for appointment at Columbia.

Columbia itself never questioned or challenged petitioner's qualifications and put no testimony, documents or authority into the record that petitioner was unqualified to teach doctoral candidates. No person at Columbia raised doubts about her qualifications to teach Columbia doctoral students. Chairman Hochberg at the investigation stage actually inscribed those graduate courses in the Columbia catalog that petitioner might appropriately teach (666-667). Former Chairman Nevin testified that petitioner's published articles were assigned to him when a doctoral student by Professor Graham and President McGill, both former Chairmen of the Department (390).

Petitioner's vitae reveals that she was recognized internationally for her scholarship and research and invited to serve as lecturer and consultant to professional and scientific societies in many parts of the world. Her federal research grants and numerous publications were bench marks of her high academic standing. The Court of Appeals completely overlooked that part of Columbia's Affirmative Action Plan that specifically directed the university to search for women with her qualifications (see: Exhibit R, Exhibit I-B-3, p. 23, and III-D-2).

It refused to consider the pervasive statistical studies referred to on reargument that show that women faculty in higher education are segregated in the two-year and four-year undergraduate colleges, and are almost completely excluded from the doctoral programs in universities (see: *Educational Record,* Sex Discrimination in Academe, Astin & Bayer, American Council on Education, Spring, 1972, p. 103).

Discriminatory criteria such as prior teaching at the doctoral level create a gender-specific classification that would effectively preclude petitioner and virtually all women now and forever from being tenured professors at Columbia and leading universities. The effect would perpetuate, as a matter of law, the inferior status of women in higher education. As a center of influence the university in turn would lead society to keep women out of the main stream and in their place in the intellectual ghetto.

Gender specific classification is as suspect as alienage, race and national origin and should be subject to heightened, if not strict, judicial scrutiny. See: *The Supreme Court,* 1974 Term, 89 Harv. L. Rev. 47, 95 (1975).

A plurality of this Court has held that different treatment accorded to applicants on the basis of sex establishes a classification subject to strict scrutiny under the Equal Protection Clause. *Frontiero v. Richardson,* 411 U. S. 677 (1973). This Court previously held that what differentiates gender or sex from a non-suspect status is not intelligence or physical disability. It has recognized that gender or sex bears no relation to intellectual ability to perform or contribute to society.

The issues raised here are of fundamental importance and should be subjected to strict scrutiny. To condone the action of the Court of Appeals is to permit the mystique of the university to blind justice and to deprive petitioner of her civil rights and society of the educated talents of academic women. Public policy demands judicial enforcement to end sex discrimiation in every occupation including those requiring highly special qualifications and responsibilities.

Petitioner's First Amendment right to criticize Columbia's hiring policy is not a permissible basis for the Court of Appeals' finding of no discrimiation.

The Court below alluded to petitioner's outspoken criticism of Columbia for discriminating against women (617, 3a). Petitioner did criticize Columbia's practice of sex discrimination expressed in letters to the New York Times (646) and to the university administration (640, 644). At that time the university was suffering a partial freeze on $13.8 million of federal funds imposed by the Department of Health, Education and Welfare (HEW) for the lack of an acceptable Affirmative Action Plan (New York Times, 1972, F 12, 1:1). The university was subjected to such pressure again and again (*New York Times,* 1972, F 27, 25:1, Mr 21, 26:3, and N 15, 51:7).

The Court's irrelevant statement concerning petitioner's criticism used to support the finding of no discrimination displayed insensitivity and was an encroachment by the state on the petitioner's First Amendment right of free speech vital to her academic freedom. *Perry v. Sinnderman,* 408 U. S. 593 (1972). See: *Elrod v. Burns,* U. S. 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Tinker v. Des Moines School Dist.,* 393 U. S. 503, 506, 513 (1969).

Conclusion.

The Court of Appeals decision is not based upon the substantial evidence on the whole record. Its exemption of institutions of higher learning from the reach of clearly stated legislated public policy denied petitioner due process and equal protection of her liberty to teach. The Court of Appeals failure to implement the law deprived petitioner of her right to be free from sex discrimination in employment and denied her of her only remedy and of due process. Women have a fundamental right to equal admission to every office and position including the highest reaches of intellectual endeavor in major public or private institutions of higher learing as in government or industry. This is a landmark case that presents significant constitutional questions affecting not only petitioner, but all women and the entire academic community. This Court should grant the petition for Certiorari and hear the issues raised.

Respectfully submitted,

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Appendix A—Opinion of Gabrielli, J.

(615) GABRIELLI, J. On this appeal, we must determine whether the State Human Rights Appeal Board exceeded its statutory authority in setting aside a determination of the Commissioner of the State Division of Human Rights that appeliants did not discriminate against the complainant on the basis of her sex. In passing upon this question, we must, perforce, decide whether the decision of the commissioner is supported by substantial evidence.

In February, 1972, complainant, Dr. Alberta Gilinsky, a tenured professor at the University of Bridgeport and an alumna of Columbia's graduate school, made formal application to Columbia's president for an appointment to the faculty of the Department of Psychology. Subsequently, she was advised that her application had been rejected because there was no vacancy for a tenured appointment in her area of specialization. Thereafter, Dr. Gilinsky filed a complaint on September 8, 1972 with the State Division of Human Rights charging that Columbia University had discriminated against her as a woman. Following hearings before the Chief Hearing Examiner of the State Division, the commissioner held that "respondents did not discriminate against Complainant because of her sex" and made the following pertinent findings of fact:

1. The Executive Committee of the Psychology Department at Columbia University decided that there was no need for a temporary or permanent appointment to a tenured position in the area of sensation and perception. Complainant was aware that the committee considered her area of specialization to be sensation and perception and members of the faculty informed her that the department had sufficient strength in that area.

2. Because of operating deficits in recent years, Columbia University undertook efforts to control spending, and as part (616) of its program, restricted the number and

level of the new faculty appointments in all departments, including the Department of Psychology. As early as 1970, it was clear to the department that vacancies on its faculty would not automatically be filled and new appointments were restricted; it was the university's policy to replace deceased or retiring senior faculty members at the junior or nontenured level.

3. The Department of Psychology made two new appointments for the 1972-1973 academic year, both at the junior level. No recommendations for tenured appointments for the 1972-1973 academic year were made and the last such appointment was made in 1970.

The reviewing function of the State Human Rights Appeal Board is narrowly prescribed under subdivision 7 of section 297-a of the Executive Law which provides that "[t]he board may affirm, remand or reverse any order of the division * * * provided however that the board shall limit its review to whether the order of the division is: * * * d. supported by substantial evidence on the whole record; or e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Thus, the authority of the appeal board in reviewing the determination of discrimination is limited by statute to the power of a court reviewing an administrative determination made after a hearing (see *Matter of Mize v State Div. of Human Rights,* 33 NY2d 53, 57; *New York Inst. of Technology v State Div. of Human Rights,* 48 AD2d 132, 134; *State Div. of Human Rights v Syracuse Univ.,* 46 AD2d 1002, 1003; *Long Is. R. R. Co. v New York State Div. of Human Rights,* 42 AD2d 857). We have summarized the scope of judicial review in the following manner: "The courts may not weigh the evidence or reject the choice made by the Board where the evidence is conflicting and room for choice exists" (*Matter of Stork Rest. v Boland,* 282 NY 256, 267). We conclude that the determination of the commissioner was supported by substantial evidence and that the appeal board was not entitled to conclude that complainant had been discriminated against. Such determination by the board was based on a contrary view of the weight of the evidence, a standard of review which the board is not authorized to apply. The board is not empowered to find new facts or take a different view of the weight of the evidence if the commissioner's determination is supported by substantial evidence; and a review of the commissioner's findings and the evidence presented (617) at the hearing amply demonstrates that they were founded upon substantial evidence. Prefatorily, we note that there is no reason to disturb the commissioner's finding that Dr. Gilinsky first applied for a faculty position in 1972. Her prior inquiries consisted of correspondence with members of the Psychology Department to whom she expressed an interest in teaching at Columbia but who were not involved in the hiring of new faculty; other correspondence with the president of Columbia University and the chairmen of the Psychology Department consisted of offers to assist Columbia in improving its psychology program and in effectuating academic reform, and criticism of the department for lack of women in tenured positions. The conclusion of the appeal board that Dr. Gilinsky "continuously sought employment" in the Psychology Department is erroneous and may not be sustained in light of the substantial evidence supporting the commissioner's finding that the complainant first applied for a tenured position at Columbia in 1972.

Turning to the substantive findings underlying the commissioner's determination of a lack of sex discrimination, it is manifest that the appeal board acted in excess of statutory authority by igoring those findings and substituting its own view of the evidence in place of the commissioner's determination. The appeal board decision states that "[r]espondents' restrictive designation of appellant's area as 'perception' is against the weight of the

evidence". This conclusion overlooks the evidence presented by Columbia that virually all of Dr. Gilinsky's research and scholarly writings concerned the area of "sensation and perception". Dr. Gilinsky sought to convince the members of the Columbia Psychology Department that her area was broader than they believed and she testified that she had taught college level courses in such diverse areas as social psychology and physiological psychology. While she had taught such courses in colleges not having a doctoral program like that at Columbia, it does not follow that she is a specialist in these areas. Columbia may legitimately prefer to appoint an individual who possessed special rather than general expertise in such areas and was recognized as an expert in them. Thus, while the record may contain conflicting evidence as to the complainant's area of expertise, the resolution of this conflict was for the commissioner. There is also considerable support in the record for the commissioner's further finding that the Columbia Psychology Department did not need any (618) additional faculty members in the area of "sensation and perception". It appears that at the time of complainant's application the department had two tenured professors who were centrally involved in complainant's area, two other tenured professors who did related work and three nontenured members of the faculty who were heavily involved in the area of "sensation and perception". A report from the Chairman of the Psychology Department to the Dean of Graduate Faculties concerning the 1973-1974 budget for the department tersely reveals the lack of need for an additional appointment in Dr. Gilinsky's field.

Additionally, there is no infirmity in the finding that operating deficits compelled appellant Columbia University to restrict the number and level of new faculty appointments and that the effort to reduce spending included replacement of senior faculty members who retired or died with junior level appointees. It is not controverted that

the only appointments made by the Psychology Department during the 1972-1973 academic year were at the junior level and that no tenured appointments were made following the 1970-1971 academic year. One of the junior appointees hired just prior to Dr. Gilinsky's application was a woman whose major area was mathematical psychology and whose minor field was sensation and perception. It is significant that the appeal board completely overlooks these findings despite clear and uncontradicted evidence in support of them. Instead, the board recites that the death of three senior professors and the resignation of two others freed additional funds for new faculty, since the Psychology Department was authorized 13 tenured positions. Through this reasoning, the appeal board has substituted its own view of the university's priorities in place of the judgment of university officials who are charged with operating a solvent institution and maintaining a high standard of educational excellence in the fiercely competitive milieu of higher education. In *Matter of Pace Coll. v Commission on Human Rights of City of N. Y.* (38 NY2d 28, 38) we observed that "[n]either the commission nor the courts should invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion and tenure, especially in institutions of higher learning" (see, also, *Faro v New York Univ.*, 502 F2d 1229, 1232). Complainant here would have the State Division (619) of Human Rights and this court conduct an inquiry into the Department of Psychology's subjective judgment of her area of expertise and Columbia's need for an appointment in that area. It is not the province of either the appeal board or this court to render subjective determinations as to whether Columbia University should purchase new laboratory equipment, hire junior faculty in areas it deems necessary or, in the alternative, appoint an additional tenured professor in Dr. Gilinsky's particular area of renown.

Appendix A—Opinion of Gabrielli, J.

The error of the appeal board is further compounded by its reliance on the statistical fact that, at Columbia University as a whole, there were far fewer women than men in tenured faculty positions. We cautioned in *Matter of Pace Coll. v Commission on Human Rights of City of N. Y.* (38 NY2d 28, 36, *supra*) that "a statistical predicate alone, especially where there are complicating historical reasons for a statistical bias, will not support a challenge to the employer's employment practices just because he has no or too few members of the group allegedly excluded unlawfully (see, e. g., *State Div. of Human Rights v Kilian Mfg. Corp.*, 35 NY2d 201, 209, 212)". The complainant has not shown, nor has the appeal board cited, any evidence indicating that there were enough qualified women in the eligible pool or statistical population from which a senior tenured appointment, in an area in which Columbia was seeking additional faculty, could be made. Reliance on statistical proof is also rendered inconclusive and of limited value where budgetary constraints have precluded the hiring of any tenured faculty, male or female (see *Faro v New York Univ.*, 502 F2d 1229, *supra*). We note, finally, that since 1972 Columbia has been operating under an affirmative action program approved by the Department of Health, Education and Welfare.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the determination of the State Human Rights Appeal Board annulled.

Chief Judge BREITEL and Judges JASEN, JONES, WACHTLER, FUCHSBERG and COOKE concur.

Order reversed, etc.

Appendix B—Decision of Human Rights Appeal Board.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT,

HUMAN RIGHTS APPEAL BOARD.

STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF DR. ALBERTA S. GILINSKY,

Complainant-Appellant,

vs.

COLUMBIA UNIVERSITY, IN THE CITY OF NEW YORK; WILLIAM J. MCGILL, PRESIDENT; JULIAN HOCHBERG, CHAIRMAN, DEPARTMENT OF PSYCHOLOGY; and GEORGE FRAENKEL, DEAN, GRADUATE FACULTIES,

Respondents.

Case No. CSF-28005-72
Appeal No. 2143

This is a timely appeal by Dr. Alberta S. Gilinsky, complainant-appellant (hereinafter referred to as appellant) from an Order of the Commissioner of the State Division of Human Rights dated March 22, 1974 dismissing appellant's complaint after public hearing wherein respondents were found not to have discriminated against appellant because of her sex.

The record before us shows that on September 8, 1972 appellant filed a verified complaint with annexed documents—a December 1970 New York Times' article and copies of correspondence between respondents and appellant from 1968 to 1972—in support of her charge of unlawful sex discrimination. All the annexed documents were made part of the record at the public hearing below (S.D.M., p. 71).

After investigation the Division determined that it had jurisdiction and found probable cause to believe that respondents had engaged in the unlawful discriminatory practice complained of and directed the matter for public hearing on May 22, 23 and 24 and June 13, 1973.

Thereafter, the Commissioner found that respondents did not discriminate against appellant and issued an Order dismissing the complaint and she filed a timely appeal with this Board.

On appeal, appellant contends that the Order of the Commissioner is not supported by substantial evidence on the whole record.

The undisputed evidentiary facts elicited by the Division below shows that appellant first applied for a teaching position at the graduate level of the Psychology Department at Columbia on April 25, 1968, when she wrote to Professor Ralph Hefferline, a member of the Executive Committee in the Psychology Department (appellant's Exhibit 7, S.D.M. pp. 62-63) and to Professor Clarence H. Graham of the Psychology Department (appellant's Exhibit 8, pp. 63-64 S.D.M.).

In response to her letters Professor Hefferline informed her on May 3, 1968 that there were no openings available (appellant's Exhibit 9, p. 65, S.D.M.) and Professor Graham advised her to write to a Mr. Bush, the then Chairman of the Department of Psychology (appellant's Exhibit 10, pp. 65-66, S.D.M.) which she did on May 20, 1968 (appellant's Exhibit 11, p. 68, S.D.M.) and thereafter she met with him (p. 68, lines 13-14, S.D.M.).

On January 19, 1969 she enclosed her vitae and bibliography in a letter to Mr. Bush (appellant's Exhibit 12, p. 70, S.D.M.). Although he failed to reply (p. 70, line 25, S.D.M.) she continued to express interest in working at Columbia in her letter of 1970 to respondent McGill

enclosing a clipping of a New York Times' article (appellant's Exhibit 14, p. 83, S.D.M.) on women's employment practices at Columbia University (p. 78, lines 9-25; p. 79, lines 2-5).

The subject article entitled "Columbia Accused of Bias on Women" indicates that while fewer than one per cent of the full professors at Columbia were women, the percentage of nontenured faculty positions were higher.

The article goes on to quote respondent Fraenkel here as follows:

> "*A tenured university position* • • • requires a tremendous amount of dedication and time that *interferes with our normal idea of a woman's role in the family.*" (emphasis added)

Notwithstanding, appellant's long standing interest in teaching at Columbia is evidenced by her letter of January 23, 1971 to Mr. Nevin (appellant's Exhibit 15) and her 1972 correspondence with respondent McGill (appellant's Exhibits 17 and 20) which in effect culminated in the filing of the subject complaint with the Division on September 8, 1972 charging respondents with unlawful sex discrimination.

On the basis of the uncontroverted documentary evidence before us, it would appear that appellant continuously sought employment at the Graduate Faculty of the Psychology Department of respondent University since the 1968-69 academic year up to the time when she filed her complaint in 1972.

In light of that it would appear that respondents here are charged by appellant with a continuing wrong. Accordingly, the statutory jurisdiction of the Division over the subject matter as particularized in appellant's complaint and annexed documents thereto extends to the inception of that wrong in the 1968-69 academic year up to the time when she invoked the jurisdiction of the Division by filing her complaint in 1972.

With respect to the issue before this Board on whether the Order of the Commissioner is supported by substantial evidence on the whole record, examination of the undisputed evidentiary facts clearly establishes that respondent McGill, President of Columbia, and, the then Chairman of the Psychology Department, were fully aware of appellant's impressive and impeccable professional credentials and of her continued interest in working at the Graduate Faculty of the Psychology Department of respondent University.

On that point, appellant's letter of February 28, 1972 (appellant's Exhibit 17) partly reads as follows:

> "You have *already* been sent my vitae, bibliography and selected reprints, and I will be glad to furnish additional information at your request." (emphasis added)

Yet, no additional information was ever requested by respondents. Presumably, they were well acquainted with her credentials and her previous work at the undergraduate level of the Department of Psychology at Columbia.

It should further be noted that respondents' Exhibit AA indicates that when appellant applied in the 1968-69 and 1969-70 academic years there were vacant tenured positions in the Department of Psychology. This is corroborated by appellant's Exhibit 15, which shows that the then Chairman of the Department of Psychology (Mr. Nevin) had written on January 5, 1971 to the New York Times stating that in 1969 and 1970 five new tenured professors had been appointed to his department (appellant's Exhibit 15).

Documentary proof in the record clearly establishes that her high standing in the academic community and her areas of expertise in research, publications and teaching were much broader than respondents here would have us believe.

Respondents' restrictive designation of appellant's area as "perception" is against the weight of the evidence adduced below in that the five tenured male professors hired while she was seeking employment could be similarly identified with her background.

The record further shows that in addition to her scholarly merits and academic excellence respondents were aware that Dr. Gilinsky, a full tenured professor of Psychology at the University of Bridgeport since 1970, is a married woman with four children.

On the latter point, the New York Times' clipping quoting respondent Fraenkel is most enlightening as to his criterion on tenured professorship and the interfering role of a woman with family—such as appellant here.

However, the undisputed significant factor here is that the Times was quoting none other than the Dean of Graduate Faculties—one of the persons who had to approve her application while appellant was seeking employment.

Dean Fraenkel's statement seems to ignore that the ancient canard on a woman's obligation to society in raising children have ceased to be relevant in a technological society where the inexorable necessity of earning a living has established the rightful role of millions of women at all levels of the labor force in America.

Moreover, respondent Fraenkel's rationale can no longer be considered valid in light of the public policy of this State as embodied in the Human Rights Law specifically prohibiting sex discrimination in employment which in effect has eliminated the spectrum of disparate generalities resulting from sex stereotypes.

Apparently, under Section 296.1(d) of the Human Rights Law, Dean Fraenkel, who after all, had to approve appellant's appointment at some point during the hiring process, had no valid reason to circulate or to cause to be printed or circulated any statement which

expressed directly or indirectly any limitation, specification or discrimination as to sex unless based upon a bona fide occupational qualification.

In the absence of said bona fide occupational qualification here, it would appear that respondent Fraenkel unlawfully discriminated against appellant, a married mother seeking employment at Columbia, in violation of Section 296.1(d) of the Human Rights Law.

Here, respondent McGill's letter of December 3, 1970 (Exhibit 13, p. 82, S.D.M.) is also enlightening in that, as President of Columbia University, he openly acknowledges that the Times' article correctly reported that federal authorities had been pressing Columbia University for suitable evidence that they did not pursue sex discrimination.

On the basis of the evidence in the record, notice must be taken that private higher education institutions which have federal contracts such as Columbia University, had to develop a written affirmative action plan for each of their faculties including an analysis and evaluation of employment opportunities for women and minorities, specific numerical goals and timetable for correcting existing discrimination, and, apparently, Columbia had failed to do so.

A letter in the record before us by the President of Columbia, respondent McGill, is to the point:

> "Among the deficiencies cited by HEW officials in the rejection of Columbia's Affirmative Action Program is our current inability to produce job related data on the sex and ethnic identity of applicants for employment at the University." (Exhibit 14)

However, what is truly significant here is the sworn testimony of Ms. Barbara Buoncristiano, an administrative aide at Columbia at the Public Hearing below.

It partly reads as follows:

> "The college senator asked President McGill if President McGill really believed that Columbia University did not discriminate against women . . .
>
> Mr. Stitt: I object to this.
>
> The Hearing Examiner: Did you hear President McGill's response?
>
> Witness: Yes, I was involved in the conversation". (lines 20-25, p. 537)
>
> The Hearing Examiner: Overruled (Witness continuing):
>
> President McGill said he had taught at Columbia for a number of years and that when he was teaching in the Psychology Department he had never been given any other information other than a person's qualification in term of judging somebody for a position.
>
> He said, however, that *it was a non-written rule in the department that no woman would be hired*". (p. 538, lines 1-11) (emphasis added)

At no time respondent McGill rebutted her testimony. Furthermore, respondents' own Exhibit 111 D-1 would appear to indicate that nothing has actually changed at Columbia insofar as to that non-written rule.

Examination of pages 1 and 2 of respondents' Exhibit 111 D-1 reveals that full-time male faculty members earned *more* than their female counterparts. It further indicates, among other things, that in the School of Architecture there were 20 full-time faculty members and no females (111-E-3); School of Law had full-time males and no females (111-E-9); School of Journalism had 15

males and no females (111-E-12); School of Business had 89 males and 2 females (111-E-18); School of Arts had 16 males and 2 females (111-E-27).

Page 1 of Table AS-1 of respondents' Exhibit shows that there were 15 males and one female in Anthropology; 28 males and no females in Economics; 40 males and no females in Political Science; 26 males and one female in Sociology.

Page 3 indicates that there were 7 males and no females in Astronomy; 18 males and no females in Chemistry; 18 males and no females in Geology; 10 males and no females in Mathematical Statistics and in the Department of Psychology—where appellant had been applying since 1968—17 males and one female.

Although Columbia has a responsibility to provide equal employment opportunity to females if it wants to participate in federally involved contracts, examination of the documentary evidence here indicates that women are conspicuous by their lack of participation not only in faculties but in making major decisions in appointments and promotions at respondent University.

A case in point is the Department of Psychology where the average female representation in the Faculty Committee, Executive Committee and the Personnel and Budget Committee has been inexistent.

Undoubtedly, respondents' Affirmative Action Program presupposes a commitment to non-discrimination against qualified women. Yet, the statistical proof before us conclusively establishes that Columbia maintains a distinctive discriminatory sex policy as evidenced by the existing systematic pattern of exclusion of qualified women—such as appellant here.

Apparently, the ugly head of sex discrimination keeps emerging in the very institutions entrusted with the preservation of the highest human values in our democratic society.

As to respondents' contention that Columbia had since 1970 restricted the number of new faculty appointments in the Department of Psychology due to deficit spending, it seems to be negated by respondents' own evidence. Exhibit AA indicates that in the 1970-71 academic year two tenured male professors, a Mr. Thomas Bewer and a Mr. Robert Krauss, were initially appointed to two vacancies that were available since 1968—when appellant first sought employment.

The record further shows that in spite of the alleged operating deficit, thirteen tenured positions in the Department of Psychology were authorized in 1971 as indicated in Dean Fraenkel's memorandum of November 24, 1971 (respondents' Exhibit H, p. 294) entitled "Preliminary Planning Allocation".

Neither did the budgetary restrictions apply to two males appointed visiting professors in the two academic years on either side of appellant's sabbatical year (1972-73).

Moreover, during the academic years 1970-72 the deaths of three tenured senior male professors in the Department of Psychology (Cummings, Bush and Graham) and the resignation of two other men (Nevins and Woods) created funds for new faculty within the alleged restricted budgetary limits and newly available laboratory and space facilities for appellant here—who was willing to work for Columbia even without salary during her sabbatical year.

Although none of the respondents here appeared nor testify at the public hearing below, a former chairman of the Department of Psychology for the academic years 1970-72, a Mr. John A. Nevin of 9 Meadow Road, Durham, New Hampshire, testified and described the established procedure for tenured appointments (lines 20-25, p. 288 and lines 1-10, p. 289, S.D.M.).

He stated that appointments to tenure—whether promotions from within or appointments from without—were not

made final until they went through a series of steps. The Department of Psychology would recommend an individual for an appointment to the Dean—presumably Dean Fraenkel—and the Dean would then appoint an *ad hoc committee for that one appointment only,* consisting of five tenured members of the graduate faculty—*not including any members of the Department in question.* The Chairman of the Department together with the Dean of Graduate Faculties would present the department's case for making the appointment and then the ad hoc committee would make a recommendation to the vice president and ultimately it would go to the trustees for final comment.

On the basis of Mr. Nevin's testimony it would appear that Dean Fraenkel has continuously failed to appoint an ad hoc committee to consider appellant's appointment from without. That such was the case here is established by respondents' Exhibit M which indicates that contrary to the established procedure, it was *the Executive Committee of the Department in question* that finally considered and rejected appellant's long standing application.

The Human Rights Law does not require an employer to make exceptions from established hiring procedures consisting of objective readily reviewable guidelines nor to grant special treatment to an applicant for employment.

But once an employer has established a hiring procedure, it must be uniformly applied. And here, for no valid reason respondents deviated from that procedure.

Respondents have offered contradictory and self-defeating rationalization and even attempted to claim academic immunity as a shield to prevent the investigation of the employment practices which led to appellant's charge.

Although respondents have attempted to divert attention from the unmitigated fact that an invidious distinction was

made in the treatment accorded to appellant's long standing application for employment, the record speaks for itself.

Here, the uncontroverted evidence on the conspicuous nonpresence of qualified women in the faculties; the biased statements of the Dean of Graduate Faculties (respondent Fraenkel) as to the woman's role in the family and its interference with the duties of a tenured position, and, of the President of Columbia (respondent McGill) as to the unwritten rule of not hiring women in the Department of Psychology together with the rejection of Columbia Affirmative Action Program by HEW officials spells out a continuous discriminatory hiring policy based on sex.

Although on its face the various aspects of that policy may seem innocent when considered singly, its true discriminatory nature emerges when the various aspects are viewed as a totality.

The crux of the instant charge seems to have been capsuled by the Court of Appeals in *Holland vs. Edwards,* 307 N. Y. 38 (1954) as follows:

> "One intent on violating the law cannot be expected to declare his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious by methods subtle and elusive—for we deal with an area in which subleties of conduct play no small part".

Such is the case here.

In the instant appeal this Board has been called upon to determine a question of law on whether the Order of the Commissioner dismissing appellant's complaint after public hearing is supported by substantial evidence on the whole record.

Although the law is well settled that the findings of fact of the Commissioner shall be conclusive if supported by substantial evidence on the whole record, here, the findings of fact on which the Order of the Commissioner is based are contrary to the preponderant weight of the evidentiary facts adduced below and the Order appealed from is not supported by substantial evidence.

Thus, this Board is not precluded from holding to the contrary that respondents here unlawfully discriminated against appellant because of her sex and that the Order of the Commissioner should be reversed.

In the instant case, it would appear that the Legislature did not intend to freeze out an entire generation of qualified women seeking teaching positions at Columbia into the discriminatory patterns and exclusionary employment practices because of existing arrangements at respondent University.

Appellant, under the Human Rights Law is entitled to relief and those arrangements are not that sanctified that effects of respondents' past discrimination against her cannot be overcome by offering her a tenured professorship in the Graduate Faculty of Psychology no later than the 1975-76 academic year or sooner if available, including retroactive seniority rights, privileges and benefits accorded her male counterparts since the 1968-69 academic year to effectuate the purposes of the Human Rights Law.

However, this Board has only limited powers of review and as an appellate body has no power to issue affirmative directives to that effect.

But here, there is substantial evidence on the whole record to support a finding of unlawful discrimination based on sex.

Accordingly, this matter is remanded to the Division for the purpose of the Commissioner of the State Division of Human Rights issuing an Order consistent with this decision and such other and further relief he deems relevant and proper under his broad statutory powers to effectuate the purposes of the Human Rights Law.

STATE HUMAN RIGHTS APPEAL BOARD

Dated: February 14, 1975

Irma Vidal Santaella, Presiding

The following members concur in the foregoing decision and opinion:

HON. LLOYD L. HURST
HON. EMIL LEVIN

Appendix B—Decision of Human Rights Appeal Board

Opinion.

STATE OF NEW YORK, EXECUTIVE DEPARTMENT

STATE HUMAN RIGHTS APPEAL BOARD

State Division of Human Rights on the Complaint of DR. ALBERTA S. GILINSKY,

Complainant-Appellant,

vs.

COLUMBIA UNIVERSITY, in the City of New York; WILLIAM J. MCGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

Case No. CSF-28005-72

Appeal No. 2143

The decision and order of the Commissioner of Human Rights is substantially supported by the evidence in the record taken as a whole. There is no evidence whatsoever to support the charge that complainant was discriminated against because of her sex. The complaint is, to say the least, frivolous.

STATE HUMAN RIGHTS APPEAL BOARD
Albert S. Pacetta
Member

Dated: February 14, 1975

Appendix C—Finding of Fact, Decision and Order of Jack M. Sable, Commissioner.

STATE OF NEW YORK, EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

State Division of Human Rights on the complaint of DR. ALBERTA S. GILINSKY,

Complainant,

against

COLUMBIA UNIVERSITY, in the City of New York; WILLIAM J. MCGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties.

Respondents.

Case No. CSF-28005-72

Proceedings in the Case

On the 8th day of September, 1972, the above-named complainant filed a complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division referred the case to public hearing.

After due notice, the case came on for hearing before Mathew Fonera, Hearing Examiner of the Division. The hearing was held on May 22, 23 and 24 and June 13, 1973.

Complainant appeared at the hearing and was represented by Gilinsky & Mishkin, Esqs., by Armand Gilinsky, Esq., of Counsel. Respondents appeared and were represented by Thacher, Proffitt & Woods, Esqs., by Robert S. Stitt and Anthony P. Limitone, Esqs., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Rosamond Prosterman, Esq., of Counsel.

Findings of Fact

1. Complainant Alberta S. Gilinsky, a female, has been a full tenured professor of psychology at the University of Bridgeport since 1970.

2. For many years Complainant has specialized in and conducted research in the area of sensation and perception, and is recognized for her competence in this area.

3. At all times pertinent herein, Respondent William J. McGill was President of Respondent Columbia University in the City of New York (hereinafter "Columbia"); Respondent Julian Hochberg was Chairman of the Department of Psychology at Respondent Columbia, and Respondent George Fraenkel was Dean of Graduate Faculties at Respondent Columbia.

4. On February 28, 1972, Complainant wrote to Respondent McGill, expressing her interest in an appointment to the faculty of Respondent Columbia's Department of Psychology.

5. Respondent McGill responded by letter dated March 8, 1972, acknowledging Complainant's interest and stating that it would be communicated immediately to John A. Nevin, the then Chairman of the Department of Psychology. Later that month, the Complainant telephoned Dr. Nevin and stated that she wished to be considered for a visiting professorship at half salary for the academic year 1972-73 and for a full-time tenured professorship for the following year.

6. The Complainant's application was considered at a meeting of the Executive Committee of the Department of Psychology on April 11, 1972. The meeting was conducted by Dr. Nevin.

7. The Executive Committee decided that there was no need for a temporary or permanent senior appointment in the area of sensation and perception and unanimously decided not to accept the Complainant's application. Dr. Nevin notified the Complainant promptly of the Department's decision by letter and telephone.

8. Because of operating deficits in recent years, Respondent Columbia undertook efforts to control spending, which efforts included restrictions on the number and level of new faculty appointments in all University departments, including the Department of Psychology.

9. As early as 1970, it was clear to the Department of Psychology that there would not be any expansion of its faculty. Vacancies would not be automatically filled; new appointments, including replacements, were restricted; and if a senior faculty member retired or died, policy called for any replacement to be at the junior or non-tenured level.

10. The Department of Psychology made two new appointments for the 1972-73 academic year, both at the junior level. Both of these appointments were made by February, 1972. One of the appointees was a woman

with a major area in mathematical psychology and a minor area in sensation and perception. No recommendations for tenured appointments for the 1972-73 academic year were made. The last tenured appointment was made in 1970.

11. Complainant was aware that the Respondents considered her area of specialization to be sensation and perception. She was told by the Respondents, directly or through faculty members, that the Department of Psychology already had sufficient strength in the area of sensation and perception, and that there were no plans to make any senior or tenured appointments in this area.

Decision

On the basis of the foregoing, I find that the Respondents did not discriminate against Complainant because of her sex, in violation of the Human Rights Law.

Order

Based on the foregoing Findings of Fact and pursuant to the Human Rights Law, it is

ORDERED, that the instant complaint be and the same is hereby dismissed.

Dated: Mar 22 1974
New York, New York

STATE DIVISION OF HUMAN RIGHTS
Jack M. Sable
Commissioner

Supreme Court, U.S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-845

ALBERTA S. GILINSKY,

Petitioner,

v.

COLUMBIA UNIVERSITY in the City of New York; WILLIAM J. McGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

FLOYD ABRAMS
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January 19, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-845

ALBERTA S. GILINSKY,

Petitioner,

v.

COLUMBIA UNIVERSITY in the City of New York; WILLIAM J. McGILL, President; JULIAN HOCHBERG, Chairman, Department of Psychology; and GEORGE FRAENKEL, Dean, Graduate Faculties,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Decision and Order of the Commissioner of the State Division of Human Rights of the State of New York (the "Commissioner") and the Order and Decision of the Human Rights Appeal Board ("Appeal Board") are not officially reported. The decision of the Appellate Division of the Supreme Court of the State of New York, First Department, without opinion, is reported at 48 A.D. 2d 1012 (1975). The opinion of the Court of Appeals of the State of New York is officially reported at 39 N.Y.2d 612 (1976), and unofficially reported at 385 N.Y.S.2d 19 and

350 N.E.2d 396. The motion for rehearing in the Court of Appeals was denied without opinion and is not reported.

Jurisdiction

Petitioner asserts jurisdiction of this Court arises under 28 U.S.C. § 1257(3).

Question Presented

Whether the Court of Appeals correctly held that the Appeal Board exceeded its statutory authority in setting aside a determination of the Commissioner based upon substantial evidence that respondents did not discriminate against the petitioner on the basis of her sex.

Statutes Involved

Generally, the New York Executive Law §§ 290, *et seq.* ("Human Rights Law") (*McKinney* 1972, *McKinney* Supp. 1976-77), and specifically § 297-a(7)(d) which provides:

"§ 297-a State human rights appeal board

"7. The board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is: * * *

d. supported by substantial evidence on the whole record * * *."

Statement of the Case

Petitioner Gilinsky, upon her own initiative and not in response to any advertisement of Columbia University or other information that a position was available, by letter dated February 28, 1972 to Dr. McGill, President of Columbia, applied for a tenured appointment in Columbia's Department of Psychology (649).* Her application was rejected because there was no vacancy for a tenured appointment in her area of specialization—that of "sensation and perception" (651).

The instant proceeding was commenced by the filing by petitioner of a complaint with the New York State Division of Human Rights ("State Division"). The complaint charged respondents with a discriminatory employment practice "by refusing to appoint me to the faculty [of Columbia] as a visiting professor and then a full tenured professor" by reason of the fact that petitioner is a female (20a).

After full evidentiary hearings at which petitioner was represented by counsel, Commissioner Sable of the State Division held "I find that the Respondents did not discriminate against Complainant because of her sex." (19a) This Decision was based on findings of fact which were supported by substantial evidence (17a-19a). The Decision and Order of the Commissioner was appealed by petitioner to the Appeal Board which by a three to one vote, reversed —purportedly on the ground that the Decision was not supported by substantial evidence.

The Appellate Division, First Department, confirmed the Order and Decision of the Appeal Board. Thereafter, the Appellate Division, First Department, granted Columbia's

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* References are to page numbers in the Appendix of respondents submitted to the Court of Appeals.

motion for leave to appeal. The Court of Appeals then unanimously reversed the Appellate Division and annulled the determination of the Appeal Board, thus reinstating the Commissioner's Decision and Order dismissing petitioner's complaint. The opinion of Judge Gabrielli was rightly limited to determining that the Appeal Board had exceeded its statutory authority in setting aside the Commissioner's determination since his Decision and Order was supported by substantial evidence on the record as a whole.

ARGUMENT

POINT I

There Is No Federal Question Present in This Case.

It is fundamental that for this Court to have jurisdiction under 28 U.S.C. § 1257(3) a substantial federal question must have been properly raised in the state court proceedings. Of course, not every allegation of a federal question suffices to afford jurisdiction. There must be a real substantive question on which the case may turn, not merely a formal one; nor may it be so absolutely devoid of merit as to be frivolous. *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311 (1902). A purported federal issue not meeting these standards is insubstantial and properly results in a denial of the petition for a writ of certiorari. *Zucht* v. *King,* 260 U.S. 174, 177 (1922). See also *Palmer Oil Corp.* v. *Amerada Petroleum Corp.,* 343 U.S. 390 (1952).

The only material issue in this case quite clearly does not present such a substantial federal question. Ever since the Commissioner's holding "that the Respondents did not discriminate against Complainant because of her sex . . ." there has only been one fundamental issue in this case—whether his Order dismissing the complaint was supported

by substantial evidence on the record as a whole. The questions of whether the Appeal Board had the statutory authority to set aside the Decision and Order of the Commissioner and of the propriety of purported evidence relied on by the Appeal Board are, of course, but corollaries of this major question.

Petitioner's sole contention to the Appeal Board was that the Decision and Order of the Commissioner was not based on substantial evidence, and it was this argument which she primarily pressed in the Appellate Division and the Court of Appeals. That this issue, and this issue alone, was the only one joined in this case is clear from the first paragraph of the opinion of the Court of Appeals:

> "On this Appeal, we must determine whether the State Human Rights Appeal Board exceeded its statutory authority in setting aside a determination of the Commissioner of the State Division of Human Rights that appellants did not discriminate against the complainant on the basis of her sex. In passing upon this question, we must, perforce, decide whether the decision of the Commissioner is supported by substantial evidence." 39 N.Y. 2d 612, 615

It is thus patently obvious that no federal question exists here. Petitioner's constitutional claims are at best frivolous attempts by her to gain one more opportunity at review.* The only issue this case raises is one of a determination of whether the Commissioner's holding that

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* If there were a federal question within the context of this case, it would deal with the constitutionality of the statutory framework regarding the procedure in the State Division and the review of decisions thereof. However, such a contention is not made by petitioner; in any case such an attempt would be fruitless given the similarity between the New York procedure and the constitutionally sound Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*

petitioner had not been discriminated against by Columbia on account of her sex was supported by substantial evidence on the record as a whole. The Court of Appeals, as the highest court of the State of New York, interpreting a New York statute and standards of review thereunder, found that the evidence presented at the hearing "amply" demonstrated that the Commissioner's findings were founded upon substantial evidence, and that, thus, the Appeal Board acted improperly and in excess of its authority under the State Human Rights Law in substituting its view of the weight of the evidence.

POINT II

The Purported Constitutional Questions Raised by Petitioner Are Frivolous.

Petitioner now attempts to raise four alleged constitutional infirmities in the decision of the Court of Appeals. Each is fatally defective on its face.

First, petitioner claims that she was denied due process when the Court of Appeals held that the findings of the Commissioner were supported by substantial evidence. This factual determination by the Court of Appeals certainly raises no specific constitutional issues and cannot be the subject of review by this Court. The procedure of the hearing at the State Division and the review allowed by the statute (N.Y. Executive Law §§ 290, *et seq.*) have not been constitutionally attacked, only the decisions themselves. Such an attempt to transform mere factual determinations into a due process question rising to a substantial constitutional issue must thus clearly fail.

Second, petitioner's claim that she was entitled to procedural due process by Columbia—in addition to the due

process hearing concededly afforded her by the Commissioner—likewise must fail. Respondents are not subject to the due process requirements of the Federal Constitution because Columbia is a private institution not subject to the Fourteenth Amendment standards. *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137 (2d Cir. 1973); see also *Powe* v. *Miles,* 407 F.2d 73 (2d Cir. 1968) (liberal arts college).

Third, petitioner misrepresents the holding of the Court of Appeals which did not hold that Columbia was exempt from the Human Rights Law but merely that courts should exercise great "caution and restraint in such sensitive areas as faculty appointment, promotion and tenure, especially in institutions of higher learning" (Gilinsky petition, Appendix A at 5a), in full accord with numerous federal decisions to the same effect. *See, e.g., Faro* v. *New York University,* 502 F.2d 1229 (2d Cir. 1974); *Duke* v. *North Texas State University,* 469 F.2d 829 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973).*

Finally, petitioner invokes the First Amendment in claiming that the Court of Appeals' statement concerning her criticism of Columbia was an encroachment by the state on her right of free speech. Such a contention is no more logical than it is relevant.

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* It should be noted, however, that even if the Court of Appeals had, in fact, exempted institutions of higher learning from the scope of the Human Rights Law in interpreting that statute, there would be no federal constitutional infirmity as a result thereof as it would be within the power of the New York State Legislature to do so. As petitioner herself acknowledges, such institutions were exempted from the Human Rights Law prior to 1965 and from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, prior to 1972.

POINT III

Petitioner Was Untimely in Raising Her Federal Questions.

Even assuming, *arguendo,* that federal questions have been raised in the instant petition for a writ of certiorari, it must be denied because such questions were not raised at the proper time in the state proceedings. This Court in *Godchaux Co.* v. *Estopinal,* 251 U.S. 179, 181 (1919), has said:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

In the case at bar the first mention of any of the purported federal questions now raised came in the motion for rehearing before the Court of Appeals, that motion being denied without opinion, and many of them were not even raised at that juncture. As this Court held in *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969):

> "It was very clearly established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions,
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> • • •
>
> "Questions not raised below are those in which the record is very likely to be inadequate, since it certainly was not compiled with these questions in mind. And

> in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." *Id.* at 438-439

Only if the highest state court actually considers and disposes of a question not presented at a lower level can Supreme Court review be obtained. *Bailey* v. *Anderson,* 326 U.S. 203, 207 (1945). Raising a federal question for the first time in a petition for rehearing addressed to the highest state court—as petitioner has vaguely done here with respect to only some of the purported constitutional claims now asserted—is insufficient unless that court actually entertained the petition and expressly decided the question. *Hanson* v. *Denckla,* 357 U.S. 235, 243-4 (1958); *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia,* 295 U.S. 441, 443 (1935); *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 163-4 (1932); *Forbes* v. *State Council of Virginia,* 216 U.S. 396, 399 (1910). A mere statement by the court denying the petition for rehearing is not sufficient to constitute a reviewable judgment. *Forbes* v. *State Council of Virginia, supra* at 399; *McCorquodale* v. *Texas,* 211 U.S. 432, 436-7 (1908); *Consolidated Turnpike Co.* v. *Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-4 (1913).*

Additionally, this Court may not review a state court determination if the litigant does not follow state procedures in raising the federal questions. *Beck* v. *Washington,* 369 U.S. 541, 550 (1961); *In re Lamkin,* 355 U.S. 59 (1957);

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* In any case, since the Court of Appeals did not consider any federal questions herein, they may not be considered to have been properly raised. *Cf. Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934); *Live Oak Water Users' Association* v. *Railroad Commission of California,* 269 U.S. 354, 357-8 (1925).

Stembridge v. *Georgia*, 343 U.S. 541, 547 (1952); *Pennsylvania Railroad Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-3 (1936). New York law is clear that constitutional questions may not be raised for the first time at the appellate level. *Nathan* v. *Equitable Trust Co.*, 250 N.Y. 250, 165 N.E. 282, *reargument denied*, 250 N.Y. 612, 166 N.E. 344 (1929).

Accordingly, this Court should not review the purported federal questions now raised in the instant position.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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